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Attorneys for Defendant  
TEACHSCAPE, INC.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

LAUREATE EDUCATION, INC.,

Plaintiff,

vs.

TEACHSCAPE, INC.,

Defendant.

Case No. C 07 3225 RS

DECLARATION OF GAYLE M.  
ATHANACIO IN SUPPORT OF  
DEFENDANT TEACHSCAPE, INC.'S  
OPPOSITION TO PLAINTIFF LAUREATE  
EDUCATION, INC.'S MOTION TO COMPEL  
PRODUCTION OF DEFENDANT  
TEACHSCAPE, INC.'S "COURSE  
MATERIALS"

Date: March 19, 2008

Time: 9:30 a.m.

Ctrm: 4 (5<sup>th</sup> Floor)

Judge: The Honorable Richard Seeborg

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1 I, Gayle M. Athanacio, declare as follows:

2 1. I am an attorney at law duly admitted to practice before this Court and a partner of  
3 the law firm of Sonnenschein Nath & Rosenthal LLP, counsel of record for Defendant  
4 Teachscope, Inc. (“Teachscope”). I make this declaration in support of Teachscope’s Opposition  
5 to Plaintiff Laureate Education, Inc.’s (“Laureate”) Motion to Compel Production of Teachscope’s  
6 “Course Materials”. I have personal knowledge of the matters set forth herein and could  
7 competently testify to them if called upon to do so.

8 2. The initial complaint in this action was filed by Plaintiffs Laureate and its wholly  
9 owned subsidiary, Canter & Associates, LLC (“Canter”) (collectively, “Plaintiffs”). In their initial  
10 complaint, Plaintiffs asserted causes of action for (1) misappropriation of trade secret (Cal. Civ.  
11 Code § 3426); (2) intentional interference with prospective economic relationships “with a number  
12 of educational institutions”; (3) intentional interference with the Canter/ Marygrove College  
13 contract; (4) misleading advertising, (Cal. Bus. & Prof. Code § 17500; (5) Unfair Competition  
14 (Bus. & Prof. Code § 17200); (6) misleading advertisement under the Lanham Act; and lastly (7) a  
15 copyright infringement claim.

16 3. On August 3, 2007, Teachscope filed a motion to dismiss/strike, which asserted,  
17 *inter alia*, that Laureate had failed to state a cognizable copyright infringement claim.

18 4. On September 26, 2007, the hearing on Teachscope’s motion was heard. I attended  
19 this hearing as counsel for Teachscope. At the hearing, the Court’s inquiry focused to a great  
20 extent on Laureate’s copyright claim, and, in particular, Plaintiffs’ rejection of Teachscope’s pre-  
21 litigation offer to an “apples to apples” mutual exchange of Marygrove College (“Marygrove”)  
22 final course material on which this action was predicated. Plaintiffs argued that they needed to  
23 view drafts of the allegedly infringing material in order to determine the viability of their claim.  
24 It was my impression that the Court was unpersuaded by this argument, as the Court mentioned  
25 that the more Plaintiffs argued about the drafts, the more the case sounded like it would run afoul  
26 of U.S. Supreme Court’s holding in *Bell Atlantic v. Twombly*. The Court took the matter under  
27 submission.

1           5.       Immediately following the hearing, I approached counsel for Plaintiffs, in  
2 particular, Annette Hurst, in the hope that Plaintiffs would reconsider their rejection of  
3 Teachscope's offer of a mutual exchange of final course material as the way to demonstrate that  
4 Plaintiffs' concerns and claims were unfounded. Ms. Hurst expressly rejected Teachscope's offer  
5 and again asserted that Plaintiffs would demand drafts of all course materials. Thereafter, Ms.  
6 Hurst noted that even if this case was dismissed, Plaintiffs could file in state court, adding that  
7 she believed Plaintiffs could get everything Plaintiffs wanted. Ms. Hurst stated that she was  
8 prepared to engage in "scorched earth" litigation if Teachscope continued to object to further  
9 activity in this case because Teachscope's motion to dismiss was pending. "Scorched earth" was  
10 the exact phrase Ms. Hurst used. At that point, our discussions stopped.

11           6.       On October 7, I received a letter from Daniel Kassabian, counsel for Plaintiffs, in  
12 which Plaintiffs requested that Teachscope unilaterally produce all Marygrove final course  
13 material, and also all "earliest available" drafts and latest versions. Attached hereto as Exhibit A  
14 is a true and correct copy of Mr. Kassabian's October 7, 2007 letter.

15           7.       On October 10, 2007, I responded to Mr. Kassabian's October 7 letter, informing  
16 Mr. Kassabian that Teachscope found Plaintiffs' proposal that Teachscope make a unilateral  
17 production of "first" and "final" Marygrove course material unacceptable and that Teachscope  
18 believed that setting a discovery plan was premature in light of the pending motion to dismiss.  
19 Attached hereto as Exhibit B is a true and correct copy of this letter.

20           8.       On October 15, 2007, Plaintiffs hand-served Teachscope with 80 document  
21 requests, as well as a FRCP 30(b)(6) Notice Of Deposition of Teachscope, requesting testimony  
22 on over 60 topics and subtopics. Attached hereto as Exhibits C and D respectively are true and  
23 correct copies of Plaintiffs' First Set of Requests for Production of Documents ("1<sup>st</sup> Set of  
24 Document Requests") and Notice of Deposition pursuant to FRCP 30(b)(6).

1           9.       Teachscope timely served its objections to the document requests on November 14,  
2       2007, and its objections to the Notice Of Deposition on December 7, 2007, true and correct  
3       copies of which are attached hereto as Exhibits E and F.

4           10.      On December 12, 2007, this Court issued its Order Granting Motion to Dismiss,  
5       With Leave to Amend.

6           11.      On January 22, 2008, a first amended complaint ("FAC") was filed in this action.  
7       In the FAC, Canter is dropped as a plaintiff and the sole claim alleged by plaintiff Laureate is for  
8       copyright infringement. As before, Laureate asserts it has reason to "infer" Teachscope is  
9       somehow infringing "one or more" of Laureate's copyrights.

10          12.      On January 23, 2008, Daniel Kassabian, counsel for Plaintiffs, emailed me a nine  
11       page, single spaced "meet and confer" letter regarding Teachscope's responses to Plaintiffs' 1<sup>st</sup>  
12       Set of Requests for Production. In the letter, despite acknowledging the change of claims and  
13       plaintiffs, Plaintiffs' counsel made clear that Laureate was not withdrawing or otherwise in  
14       anyway agreeing to limit Plaintiffs' document requests. Rather, Plaintiffs' counsel expressly  
15       reserved the right to seek production with regard to all documents requested. Laureate was,  
16       however, focusing its immediate demands on Plaintiffs' document requests ostensibly relating to  
17       "course material". A true and correct copy of Daniel Kassabian's January 23, 2008 letter is  
18       attached hereto as Exhibit G.

19          13.      On January 24, 2008, Teachscope was served with a complaint filed by Canter in  
20       state court, in which Canter asserts the state law claims it had previously asserted in this action.

21          14.      On January 30, 2008, I participated in a conference call to discuss the proposed  
22       stipulated protective order in this case pursuant to this Court's directive as set forth in its January  
23       22, 2008 Order Re Discovery. Elena DiMunzio, Mr. Kassabian and Ms. Hurst participated on  
24       behalf of Plaintiff. Mid-way though our discussions of the protective order, Ms. Hurst  
25       interrupted the discussion and demanded that I immediately respond to their "meet and confer"  
26       letter and advise them whether Teachscope would agree to produce the "first" drafts and all final  
27       Marygrove course materials. I told counsel I could not respond at that time. I did, however, try  
28

1 to get some clarity as to what Laureate meant by “first available drafts” and “course materials”  
 2 since the descriptions of the terms were confusing. In particular, Plaintiffs’ requests for course  
 3 materials included “websites, DVDs, videos, video media files, CDs, audio media files, syllabi,  
 4 course packets, study resources, articles, texts, course log-ins, quizzes, tests, course outlines, and  
 5 grading keys.” This description apparently included documents (articles, texts) that were  
 6 authored by third parties, not Teachscape, as well as “websites”. Asking for “first available  
 7 drafts” of these “course materials” seemed non-sensical in this context, so I asked for  
 8 clarification. Laureate’s counsel refused my request that they articulate in the context of  
 9 Laureate’s copyright claim exactly what was being asked for; rather, I was informed that  
 10 Laureate believed its requests were clear.

11 15. As Teachscape had become increasingly concerned that Plaintiffs were not  
 12 pursuing either discovery or litigation in good faith, during this call, I sought to find out what  
 13 Laureate’s true motivations were. Consequently, I asked Laureate’s counsel what I believed was  
 14 a simple, straight-forward question: Assume (1) Teachscape provided *all* of the course materials  
 15 (including “first available drafts” etc.) that Laureate had demanded be produced *to Laureate’s*  
 16 *satisfaction* (which admittedly assumed that Laureate could better articulate what it actually  
 17 wanted), and that (2) based upon their review of the Teachscape-provided material, concluded *on*  
 18 *their own that there was no substantial similarity in any of the materials*. What would Laureate  
 19 do? Ms. Hurst responded that she could not answer that question as it was an “incomplete  
 20 hypothetical” and in all events, irrelevant to Teachscape’s obligation under the Federal Rules. I  
 21 responded by noting that it was irrelevant to the extent Teachscape believed that it was in full  
 22 compliance with the Federal Rules, but that it was significant insofar as Teachscape was  
 23 considering Laureate’s demands. The matter was left whereby the parties agreed to reconvene  
 24 their discussions on February 1, 2008.

25 16. On January 31, 2008, Daniel Kassabian sent me a letter in which he reiterated  
 26 Laureate’s demand for the earliest available drafts, and he ostensibly sought to clarify Plaintiffs’  
 27 request for “first available drafts”. As noted in Mr. Kassabian’s letter, Laureate’s clarification was

1 to reference the Copyright Act, 17 U.S.C. § 101 definition of “created” and ask for any “document  
2 or thing...that resulted in a final course material provided to students or teachers.” In his letter,  
3 Mr. Kassabian referred Teachscape back to the “types” of materials specified in the actual  
4 requests. Attached hereto as Exhibit H is a true and correct copy of Mr. Kassabian’s letter.

5 17. On February 4, 2008, Teachscape was hand-served with the following discovery in  
6 Canter’s state court action: Canter’s First Set of Special Interrogatories; Canter’s First Request for  
7 the Production of Documents; and Canter’s First Set of Form Interrogatories. True and correct  
8 copies of this discovery is attached hereto as Exhibit I.

9 18. On February 1, 2008, a further “meet and confer” teleconference with regard to  
10 Laureate’s document requests took place. During this call, I requested that Laureate agree to a  
11 stay of discovery pending a ruling on Teachscape’s motion to dismiss the FAC. In this call, Mr.  
12 Kassabian confirmed Laureate was not amenable to any sort of stay. Consequently, I informed  
13 Mr. Kassabian that Teachscape would be moving for a protective order. In so doing, I noted that  
14 Teachscape still did not understand why Plaintiffs continued to refuse Teachscape’s offer of an  
15 “apples to apples” exchange of allegedly infringing and infringed course material. I further asked  
16 Mr. Kassabian the question: Would Laureate dismiss the action if Teachscape produced to  
17 Laureate all of the course materials it wanted (again, assuming there was a meeting of minds as to  
18 what Laureate was actually asking for) and Laureate (not Teachscape) concluded there was no  
19 substantial similarity in any of the materials. Mr. Kassabian responded that he could not say that  
20 Laureate would dismiss the action. Rather, he indicated that Teachscape should produce the  
21 materials and then the parties could have a further discussion. Based upon Laureate’s counsel’s  
22 responses, coupled with Plaintiffs’ refusal to withdraw or limit any of the requested discovery,  
23 Canter’s filing of a separate action and service of discovery in that action, Teachscape concluded  
24 Plaintiffs’ “discovery” was merely designed to unduly burden and harass Teachscape and I so  
25 informed Mr. Kassabian. Mr. Kassabian disagreed with Teachscape’s observations regarding  
26 Laureate’s motives but confirmed he would be filing a motion to compel. I asked whether the  
27 scope of the motion to compel would be limited to the requests regarding “final” and “first draft”  
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1 course offerings, which I noted remained unclear.

2 19. On February 4, 2008, I followed up my conversation with Mr. Kassabian by  
3 sending Mr. Kassabian a further letter. Attached hereto as Exhibit J is a true and correct copy of  
4 my February 4, 2008 letter. In response, on February 6, Mr. Kassabian and Ms. DiMuzio called  
5 me. In this telephone conversation, Mr. Kassabian indicated that Laureate intended to move on a  
6 limited number of document requests but he expressly stated that Laureate was reserving its right  
7 to file subsequent motions to compel with regard to the other discovery it had served. I again  
8 reiterated the offer of a mutual exchange of course materials, in particular, allowing Laureate  
9 access to the allegedly infringing online Marygrove course offerings. Mr. Kassabian, while  
10 suggesting he would accept Teachscape unilaterally providing Laureate with such access, stated  
11 that hard copies of the final course offerings would also be required, that Laureate would continue  
12 to demand “first available drafts,” and that if Teachscape wanted Laureate’s course materials, it  
13 would have to serve formal discovery on Laureate, or alternatively, seek copies from the  
14 Copyright Office. When I continued to note Teachscape’s position that the description of “course  
15 material” and request for “first available drafts” was confusing, particularly in light of the nature  
16 of the materials (online materials and materials authored by third parties), Mr. Kassabian informed  
17 me he felt the explanation given, which merely referenced the Copyright Act, was sufficient. This  
18 discussion cemented Teachscape’s belief that Plaintiffs were not pursuing litigation and/or  
19 discovery in good faith and I so informed Mr. Kassabian.

20 I declare under penalty of perjury under the laws of the United States of America and the  
21 State of California that the foregoing is true and correct.

22 Executed this 20th day of February, 2008, at San Francisco, California.

24 /S/

25 GAYLE M. ATHANACIO

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